

**MEMORANDUM OF UNDERSTANDING
AND DELEGATION OF AUTHORITY
BETWEEN
THE VERMONT AGENCY OF NATURAL RESOURCES
AND
THE NATURAL RESOURCES BOARD**

This document sets forth the understanding between the Secretary of the Agency of Natural Resources (Secretary or ANR) and the Natural Resources Board (Board) with respect to certain aspects of enforcement of violations of 10 V.S.A. Chapter 151 (Act 250) and ANR Statutes. This document further delegates to the Board certain authority vested in the Secretary pursuant to 10 V.S.A. Chapter 201 to enter into Assurances of Discontinuance in mixed jurisdiction enforcement cases pursuant to 10 V.S.A. §8007, to issue Administrative Orders in mixed jurisdiction enforcement cases under 10 V.S.A. §§ 8008 and 8009, to issue Warnings and Notices of Alleged Violation pursuant to 10 V.S.A. §§ 8006 (a) & (b) and to enforce final Administrative Orders and commence collection actions pursuant to 10 V.S.A. §8014.

1. *Background and Purpose.* 10 V.S.A. Chapter 201 establishes a mechanism for enforcing many of Vermont's environmental laws, regulations, permits and orders issued thereunder, including Act 250. Among other things, it empowers the Board to negotiate Assurances of Discontinuance (AOD), and to issue Administrative Orders (AO) and Emergency Administrative Orders regarding Act 250 violations.

Chapter 201 also empowers the Secretary to pursue enforcement of a host of programs administered by ANR. In many cases, a regulated party in Vermont is subject to regulation under Act 250 in addition to one or more ANR programs.

ANR and the Board are committed to effective, efficient, consistent and fair enforcement of Vermont's environmental laws. In order to achieve that objective, and in view of the overlapping jurisdictions and shared responsibilities described above, the Secretary and Board believe it is important to clarify and standardize the procedures that will be used by their respective delegates and employees to investigate, negotiate and litigate all violations of Vermont's environmental laws, regulations and permits. This document sets forth those procedures. It is not intended to establish substantive enforcement policies or dictate any particular results, nor should it be so construed.

2. *Intake of Complaints*

a. *Act 250 complaints (non-mixed).* If ANR receives any complaint of, or information constituting notice of, solely an Act 250 violation(s) it shall be promptly routed to the Board's Enforcement Officer (BEO). The principal role of the BEO is to perform Act 250 compliance and enforcement functions as determined by the Board. The BEO may coordinate directly with ANR program staff in cases that consist solely of Act 250 violations in instances where there is no independent ANR jurisdiction. If, during the course of a BEO investigation, it becomes apparent that a violation involves any ANR

Memorandum of Understanding and Delegation of Authority

Page 2

jurisdiction, the BEO will promptly notify ANR.

b. *ANR complaints (non-mixed)*. If the Board receives a complaint of, or information constituting notice of, solely an ANR violation(s) it shall be promptly routed to the ANR Environmental Compliance Division (ECD) Administrative Assistant or Chief Environmental Enforcement Officer (CEEO). ECD will assign the complaint to an Environmental Enforcement Officer (EEO). The principal role of the EEO is to perform ANR investigation and enforcement functions as determined by the Secretary. If, during the course of an EEO investigation, it becomes apparent that a violation involves any Act 250 jurisdiction, the EEO will promptly notify the BEO.

c. *Mixed ANR/Act 250 complaints*. If ANR, the Board, an EEO or BEO receives a complaint that appears to involve both ANR and Act 250 violations they shall promptly inform the other and coordinate as necessary. If, during the course of the investigation, it becomes apparent that a violation involves mixed jurisdiction, the EEO and BEO shall consult as to whether the complaint merits further investigation, the nature of that investigation, who will conduct it, and who will be the investigation lead. The EEO and BEO may consult with Board General Counsel, Board Associate General Counsel, or ANR Chief EEO. Specifically, the matter will be evaluated to determine whether it consists solely of Act 250 violations, solely of ANR violations, or of both Act 250 and ANR violations (a "mixed case"). If the matter includes violations under both ANR and Act 250 jurisdiction, the EEO and BEO shall confer promptly to determine which type of violation predominates. This determination shall be based on all of the factors present in the case, including but not limited to, the following:

- i. The comparative number of violations;
- ii. The nature of the violations;
- iii. Their legal and factual complexity;
- iv. The severity of harm or threat of harm to the environment; or to public health, safety and welfare; and
- v. The alleged violator's record of compliance and degree of culpability.

In general, the investigator with the predominance of violations shall take the lead on the investigation. The other investigator shall cooperate in the investigation as necessary. As a general matter, the Secretary and the Board agree that Act 250 and ANR violations should be pursued jointly where feasible (as further described below). However, for various reasons, including strategic

concerns, both parties recognize that in some matters, Act 250 and ANR investigations will be pursued separately.

3. *Investigations of mixed ANR/Act 250 complaints*

a. *Role of EEO and BEO.* The assigned investigator (EEO or BEO) shall take the lead on matters assigned to them. The EEOs and BEO shall cooperate closely in the course of an investigation to ensure that investigative resources are used efficiently. Upon completion of an EEO or BEO investigation, the investigator shall inform the other entity of their findings. The BEO will coordinate directly with the EEO on all mixed case investigations. The EEO will be responsible for coordinating with any necessary ANR program staff for ANR complaints that are part of a mixed case, and shall provide all pertinent information to the BEO. The BEO may coordinate with any necessary ANR program staff for Act 250 complaints that are part of a mixed case provided the BEO has first conferred with the EEO and provides all pertinent information to the EEO. Investigation status or results can be provided verbally, via email, or a draft NOAV, provided the EEO and BEO have conferred on who will draft the NOAV. Draft Administrative Orders and Assurances of Discontinuance will not be used to communicate investigation status or results.

b. *NOAV Coordination:* After a preliminary investigation, either the EEO or BEO may issue an NOAV pursuant to 10 V.S.A. § 8006, provided they have conferred and ensured that the other has reviewed and approved any mixed case NOAV prior to its issuance. Each shall promptly forward a copy of the NOAV to the other.

c. *Case Referrals.* If a referral to ANR or the Board for formal enforcement action is contemplated by either the EEO or BEO for their respective violations, they shall promptly notify the other of that decision. ANR and the Board shall review their respective referred violations in accordance with their respective internal case review processes, and shall promptly notify the other of the outcome of that review. If either the Board or ANR receives, but disapproves of a referral for formal enforcement action in a mixed case, each entity may separately enforce the violations within their independent jurisdiction.

4. *Legal Lead Determination and Case Assignment.* Following review and approval of ANR and Board violations through their respective review processes, decisions on how to

Memorandum of Understanding and Delegation of Authority

Page 4

proceed with enforcement of violations will be made as follows:

a. *Pure vs. Mixed Cases.* "Pure" cases (solely ANR or Act 250 violations) will be handled by the respective entities.

If the matter is a "mixed" case -- i.e., it consists of Act 250 and ANR violations -- the Board General Counsel (or Board Associate General Counsel) and the ANR Enforcement & Litigation Section Chief shall confer promptly to determine which type of violation predominates. This determination shall be based on all of the factors present in the case, including but not limited to, the following:

- i. The comparative number of violations;
- ii. The nature of the violations;
- iii. Their legal and factual complexity;
- iv. The severity of harm or threat of harm to the environment; or to public health, safety and welfare; and
- v. The alleged violator's record of compliance and degree of culpability.

In general, the entity with the predominance of violations shall take the legal lead on the case. The other entity shall cooperate as necessary. As a general matter, the Secretary and the Board agree that Act 250 and ANR violations should be pursued jointly where feasible (as further described below). However, for various reasons, including strategic concerns, both parties recognize that in some matters Act 250 and ANR claims will be pursued separately.

b. *Act 250-predominant Cases.* In a mixed case in which Act 250 violations are determined to predominate, the Board General Counsel will assign the case to him or herself or the Board Associate General Counsel for the purpose of initiating an enforcement action. If settlement negotiations are undertaken and unsuccessful, the Board General or Associate General Counsel may commence litigation under 10 V.S.A. Ch. 201. The Board General or Associate General Counsel shall consult with the ANR Enforcement & Litigation Section Chief to ensure that the case is handled in a manner consistent with other Ch. 201 enforcement cases handled by the ANR Enforcement & Litigation Section.

The Secretary hereby authorizes the Board General and Associate

General Counsel to litigate in the Secretary's name, provided such consultation occurs, the Secretary agrees to the litigation approach, and the litigation is conducted pursuant to the limitations set forth in §14 of this Memorandum.

c. *ANR-predominant Cases.* For a case in which ANR violations are determined to predominate, the ANR Enforcement & Litigation Section Chief will assign the case to him or herself or an Enforcement & Litigation attorney for the purpose of initiating an enforcement action. If settlement negotiations are undertaken and unsuccessful, the Enforcement & Litigation Section Chief or Attorney may commence litigation under 10 V.S.A. Ch. 201. The Enforcement & Litigation Section Chief or Attorney shall consult with the Board General or Associate General Counsel to ensure the case is handled in a manner consistent with other Ch. 201 enforcement cases handled by the Board.

The Board hereby authorizes the ANR Enforcement & Litigation Section to litigate in the Board's name, provided such consultation occurs, the Board agrees to the litigation approach, and the litigation is conducted pursuant to the limitations set forth in §14 of this Memorandum.

d. *Criminal Matters.* In the event that either the Board General Counsel or ANR Enforcement & Litigation Section Chief determines that a mixed case should be considered for criminal prosecution, he or she shall consult with the other and obtain their approval prior to making any referral.

5. *Negotiation.* The Secretary and the Board recognize that most cases will be resolved through the negotiation of an AOD. Whether negotiated by Board staff or ANR staff, these AODs should be consistent in their general terms and approach, and also in their results, recognizing that each case is different and that many factors help determine the course of any negotiation. Furthermore, in mixed cases it is necessary that the entity whose violations do not predominate has meaningful input into the negotiation process and the result, with regard to the portion of the case that concerns it, without unduly interfering with the overall result desired by the entity whose violation predominates. To this end, the Board General Counsel, the Board Associate General Counsel, and the ANR Enforcement & Litigation Section Chief shall cooperate on an on-going basis in an effort to ensure consistency and open communication. In addition, with respect to specific cases, the following process, in general, shall be followed:

a. *Act 250-predominant Cases.* In Act 250-predominant cases, the Board General or Associate General Counsel shall consult with the ANR Enforcement & Litigation Section Chief during the course of negotiations as necessary in

Memorandum of Understanding and Delegation of Authority

Page 6

order to ensure consistency and to receive input regarding the appropriate treatment of ANR violations in the case. Communication early in the negotiation process is encouraged. The Board shall not sign any AOD without first giving the ANR Enforcement & Litigation Section Chief advance notice of its terms and a reasonable opportunity to object, through the Secretary if necessary, to the proposed resolution. If the above procedures are followed, and the ANR Enforcement & Litigation Section Chief gives approval with respect to the ANR violations, the Board is authorized to sign Act 250-predominant AODs without the signature of the Secretary or its designee. The Secretary and Board agree that in some mixed cases it may be advisable for both to sign AODs, and agree to cooperate to that end.

b. *ANR-predominant Cases.* In ANR-predominant cases, the assigned Enforcement & Litigation Attorney shall consult with the Board General or Associate General Counsel during the course of negotiations as necessary in order to ensure consistency and to receive input regarding the appropriate treatment of Act 250 violations in the case. Communication early in the negotiation process is encouraged. The Secretary shall not sign any AOD without first giving the Board General or Associate General Counsel advance notice of its terms and a reasonable opportunity to object, through the Board Chair if necessary, to the proposed resolution. If the above procedures are followed, and the Board General Counsel gives approval with respect to the Act 250 violations, the Secretary is authorized to sign ANR-predominant AODs without the signature of the Board or its designee. The Secretary and Board agree that in some mixed cases it may be advisable for both to sign AODs, and agree to cooperate to that end.

6. *Litigation.* The Board's Counsel litigating Act 250-predominant cases remains a Board employee with an attorney-client relationship running to the Board (as well as the Secretary). The ANR Enforcement & Litigation Attorney litigating ANR-predominant cases remains an ANR employee with an attorney-client relationship running to ANR (as well as the Board). In order to ensure that such cases are handled consistent with other cases handled by the ANR Enforcement & Litigation Section and the Board, and to promote the development of the law under Chapter 201 in a direction that is in the best interests of the Secretary and the Board, the ANR Enforcement & Litigation Attorney and Board's Counsel shall seek the advice of, consult with, and obtain the approval of the ANR Enforcement & Litigation Section Chief or the Board General Counsel as the case may be prior to issuing an Administrative Order. In all environmental enforcement cases -- pure and mixed -- all Board and ANR staff, including the BEO, District Coordinators, EEOs, and ANR program staff shall cooperate fully with the trial

attorney as necessary in preparing and presenting the case.

7. *Client Decisions.* The Secretary and the Board retain to themselves or their delegates the right to make all decisions within the purview of a "client" as that concept is embodied in the law of professional legal ethics. Those decisions include, but are not limited to, whether to commence an action, whether to settle and on what terms, and major strategic decisions in the life of a case. All attorneys involved in Act 250/ANR enforcement shall respect this right, and shall consult with the designated point persons of the Board and Secretary as appropriate. In ANR-predominant cases, the Board continues to have a right to make "client" decisions with respect to Act 250 violations being addressed in the case (although it recognizes the need to reasonably accommodate the Secretary's wishes in such a case). Similarly, in Act 250-predominant cases, the Secretary continues to have a right to make "client" decisions with respect to ANR violations being addressed in the case (although the Secretary recognizes the need to reasonably accommodate the Board's wishes in such a case). The aforementioned "need to reasonably accommodate" the interests of the entity with the predominant stake in a case is based on the shared view of the Board and the Secretary that Act 250 and ANR violations should be pursued and resolved jointly, whenever possible.

8. *Formats.* The Board and Secretary agree it is preferable to use similar forms for such documents as NOAVs, AODs, Citations, and other significant enforcement documents that the public will receive. The ANR Enforcement & Litigation Section Chief and the Board General Counsel will take steps to ensure that similar formats are used, and that necessary boilerplate or other language is included in all such documents issued in the name of each party.

9. *Dispute Resolution.* Any dispute over a consultation or decision described in this document is to be resolved at the lowest level possible, with involvement by the supervisors of the individuals involved in the dispute, as necessary.

10. *Communications and Publicity.* All information pertaining to an enforcement matter is subject to the requirements of the Access to Public Records Act, and may or may not be confidential. During investigation, all incident-related communications with a third party, the media, or any other member of the public outside of Board or ANR staff shall be made only after consultation between the CEEO and the BEO. Once an attorney is assigned to a matter, for negotiation or litigation, all case-related communications outside of Act 250 or ANR staff shall be made only by the attorney or with the attorney's approval. This includes communications with a third party, the media, Respondent, or the Respondent's agents. All formal publicity relating to an enforcement case shall be disseminated by the Board or Secretary, or their delegates.

Memorandum of Understanding and Delegation of Authority

Page 8

11. Delegates. Except as limited by §14 of this Memorandum, any authority referred to in this document as pertaining to an individual or entity, such as the Secretary, the Board, the Board General Counsel, ANR Enforcement & Litigation Section Chief, or the Environmental Compliance Division Director, may be exercised by any duly authorized and lawful delegate thereof, without affecting the validity of this Memorandum.

12. Accounting of Time, Expenses and Revenues. As directed by the ANR Enforcement & Litigation Section Chief or the Board General Counsel, as the case may be, all staff involved in an enforcement matter shall keep a record of all time spent on and expenses incurred in particular cases, and shall make such information available to the assigned attorney upon request. The purpose of collecting this information is to compile and preserve the evidence of the costs of enforcement for inclusion in penalty calculations. The ANR Enforcement & Litigation Section Chief, the Environmental Compliance Division Director, and the Board General Counsel or Board Associate General Counsel shall confer as to the most practical and cost-effective way to collect the appropriate amount of such information. Finally, the Secretary and the Board shall keep an accounting of revenues received as a result of the conclusion of enforcement cases, and shall share such information on a periodic basis, or upon request.

13. Training and Oversight. The Secretary and the Board agree to undertake all training necessary to ensure that all affected employees (a) have the understanding and skills needed to conduct efficient and effective environmental enforcement of Act 250 and ANR violations, and (b) understand one another's responsibilities under this Memorandum. The Secretary and Board agree to work toward developing mutually acceptable modifications to this Memorandum in the course of its life as necessary in light of experience and changing circumstances.

14. Delegation of Authority by the Secretary to the Board Chair: Issuance of Administrative Orders for mixed ANR-Act 250 Cases

a. *Purpose and Legal Authority.* To: delegate the authority contained in 10 V.S.A. §§8008 and 8009 to issue administrative orders and emergency orders in mixed ANR-Act 250 cases (cases involving violations of 10 V.S.A. Ch. 151 and violations of other environmental laws enumerated in 10 V.S.A. §8003(a) where the Board takes the lead).

This delegation of authority supplements, and does not supersede, other delegations of authority by the Secretary to the ANR Enforcement & Litigation Section Chief, Director of the Environmental Compliance Division and to the

Commissioner of the Department of Environmental Conservation regarding Title 10 Chapter 201. This delegation does not alter or otherwise affect any other terms in this Memorandum of Understanding.

b. *To Whom Delegated.* The Chair of the Natural Resources Board.

c. *Sub-delegation Authority.* This authority may not be sub delegated.

d. *Limitations.* This authority shall be exercised subject to any applicable policies established by the Secretary. Prior to the issuance of each administrative order, and subject to the relevant provisions of this Memorandum of Understanding, the Board Chair or the Chair's designee shall consult with the ANR Enforcement & Litigation Section Chief and obtain approval in order to ensure that the case is handled in a manner consistent with Chapter 201 enforcement cases handled by the Enforcement & Litigation Section, and in order to promote the development of the law under chapter 201 in a direction that is in the best interests of the Agency, the Board, and the State of Vermont.

Determinations of whether the ANR Enforcement & Litigation Section or the Board will take the lead in a mixed ANR-Act 250 case will continue to be governed by this Memorandum of Understanding (MOU).

e. *References*

- * 10 V.S.A. Chapter 201.
- * 10 V.S.A §8002(1) (Definition of "Board")
- * 10 V.S.A. §8002(7) (Definition of "Secretary").
- * 10 V.S.A. §§8008 and 8009 (Administrative Orders and Emergency Orders).
- * 3 V.S.A. §214 (Delegation of Authority).

15. *Delegation of Authority by the Secretary to the Board: Issuance of Warnings and Notices of Alleged Violations (NOAVs) for Act 250 Cases and Mixed Cases*

a. *Purpose and Legal Authority.* To: (a) delegate the authority contained in 10 V.S.A. §§8006 (a) & (b) to issue warnings and NOAVs for violations of 10 V.S.A., Ch. 151 (pure Act 250 cases); and (b) delegate the authority to issue warnings and NOAVs in mixed ANR-Act 250 cases (cases involving

violations of 10 V.S.A. Ch. 151 and violations of other environmental laws enumerated in 10 V.S.A. §8003(a) where the Board takes the lead.)

This delegation of authority supplements, and does not supersede, other delegations of authority by the Secretary to the ANR Enforcement & Litigation Section Chief, Director of the Environmental Compliance Division and to the Commissioner of the Department of Environmental Conservation regarding Title 10 chapter 201. This delegation does not alter or otherwise affect any other terms in this Memorandum of Understanding.

b. *To Whom Delegated.* The Chair of the Natural Resources Board.

c. *Sub-delegation Authority.* This authority may be sub-delegated pursuant to paragraph 10 of this Memorandum of Understanding.

d. *Limitations.* This authority shall be exercised subject to any applicable policies established by the Secretary and by the terms of this agreement

Determinations of whether the Enforcement & Litigation Section or the Board will take the lead in a mixed ANR-Act 250 case will continue to be governed by this MOU.

e. *References*

- * 10 V.S.A. Chapter 201.
- * 10 V.S.A. §8002(1) (Definition of "Board")
- * 10 V.S.A. §8002(7) (Definition of "Secretary").
- * 10 V.S.A. §8006 (Warnings, Notice of Alleged Violation)
- * 3 V.S.A. §214 (Delegation of Authority).

16. Delegation of Authority by the Secretary to the Board: Enforcement of final Administrative Orders and commencement of collection actions for Act 250 and Mixed Cases

a. *Purpose and Legal Authority.* To: delegate authority contained in 10 V.S.A. §8014(a) to seek enforcement of a final administrative order, final orders pursuant to an assurance of discontinuance, or civil citations pursuant to section 8019 of this title, in the Civil, Criminal, or Environmental Division of the Superior Court; delegate authority contained in 10 V.S.A. §8014(b) to bring a collection action in any Civil or Criminal Division of the Superior

Court if a penalty is assessed and the respondent fails to pay the assessed penalty within the time prescribed; and delegate authority contained in 10 V.S.A. §8014(c) to contract with private collection agencies, or with attorneys engaged for similar purposes, for the collection of penalties or other monetary awards owed pursuant to assurances of discontinuance, final administrative orders, emergency administrative orders, or judgments after hearing or other judicial rulings in pure Act 250 cases and in mixed ANR-Act 250 cases (cases involving violations of 10 V.S.A. Ch. 151 and violations of other environmental laws enumerated in 10 V.S.A. §8003(a) where the Board takes the lead).

This delegation of authority supplements, and does not supersede, other delegations of authority by the Secretary to the ANR Enforcement & Litigation Section Chief, Director of the Environmental Compliance Division and to the Commissioner of the Department of Environmental Conservation regarding Title 10 chapter 201. This delegation does not alter or otherwise affect any other terms in this Memorandum of Understanding.

b. To Whom Delegated. The Chair of the Natural Resources Board.

c. Sub-delegation Authority. This authority may be sub-delegated pursuant to paragraph 10 of this Memorandum of Understanding.

d. Limitations. This authority shall be exercised subject to any applicable policies established by the Secretary and by the terms of this agreement

Determinations of whether the Enforcement & Litigation Section or the Board will take the lead in a mixed ANR-Act 250 case will continue to be governed by this MOU.

e. References

- * 10 V.S.A. Chapter 201.
- * 10 V.S.A §8002(1) (Definition of "Board")
- * 10 V.S.A. §8002(7) (Definition of "Secretary").
- * 10 V.S.A. §8014 (Enforcement of final orders; collection actions)
- * 3 V.S.A. §214 (Delegation of Authority).

Memorandum of Understanding and Delegation of Authority
Page 12

17. Term. This MOU is effective upon the last date of signature below and remains in effect until either party provides written notice to the contrary or such time as it is revised.

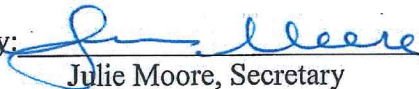
18. Modification. This MOU may be modified only by written agreement of the parties, except that the Delegation of Authority contained in this MOU may be modified or withdrawn by the Secretary at any time.

19. Prior MOU. This MOU supersedes and replaces the MOU dated 12/7/09.

This MOU is hereby approved.

AGENCY OF NATURAL RESOURCES

NATURAL RESOURCES BOARD

By: 
Julie Moore, Secretary

By: 
Diane Snelling, Chair

11/20/18
Date

11/20/18
Date